Mr. Minister, Mr. Secretary-General, Honourable Ambassadors, Ladies and Gentlemen.

Today, we are celebrating the centenary of the second Hague Convention of October 18, 1907 for the pacific settlement of international disputes. On the occasion of this centenary, Professor James Crawford, Professor Philippe Sands and I have been asked to analyze the role played by arbitration and the institutions created under the 1907 Convention in today’s world.

In order to avoid, or at least limit, repetition, it was agreed that I would come before you to speak of inter-state arbitration in general, while Philippe Sands will present some of the new prospects which have arisen in this domain due to the United Nations Convention on the Law of the Sea and James Crawford will examine the disputes which may arise between States and businesses or investors.

The Conventions of 1899 and 1907 were to govern the settlement of disputes between States by good offices, mediation, commissions of inquiry and arbitration. They created the Permanent Court of Arbitration.

This Court, as authors have emphasized on numerous occasions, was not a true Court and had no permanence. Indeed, under Article 44 of the 1907 Convention, each contracting Power merely designates no more than four persons prepared to accept the functions of arbitrator. The States party to the Convention, when they resort to arbitration, must, under Article 45, select the arbitrators called upon to form the tribunal from a list of the members of the Court.

The Court is responsible for settling disputes between contracting Powers which the Parties agree to submit to it. Furthermore, in accordance with Article 47 paragraph 2, its jurisdiction can “within the conditions laid down in the rules, be extended to disputes between non-Contracting Powers and Contracting Powers”. In all events, the Court’s jurisdiction is limited solely to disputes among States.

Furthermore, the Conventions created an International Bureau which performed the duties of Court Registrar (Article 43 of the 1907 Convention) and an Administrative Council charged with “the direction and control of the International Bureau” (Article 49, ibidem).
Initially, the mechanism set-up in this manner functioned as expected with a view to solving solely disputes between Member States. However, in 1908, the Court accepted to settle the *Grisbårdana Case* involving Sweden and Norway, although the latter country was not bound by the Convention. It was then accepted, under a broad interpretation of Article 47, that an arbitrator not belonging to the Court could sit on an arbitral tribunal. This solution was confirmed in two other cases in 1914 and 1921.

Up until 1914, the Permanent Court of Arbitration had accepted seventeen disputes. Between the two world wars, its activity slowed down due to the creation in 1922 of the Permanent Court of International Justice and only seven cases were then submitted to it. Then, like Sleeping Beauty, it fell into a deep slumber. Consequently, your Council and the International Bureau also fell into a state of lethargy.

No Prince Charming came to awaken the Court. However, during the 80s the International Bureau resumed and has developed its activities in a spectacular manner since then. What were the causes of this rebirth?

Firstly, it originated in the new interest displayed by States in the pacific settlement of disputes following the cold war. Over the last two decades, this trend has enhanced both the role of the International Court of Justice and that of the arbitration tribunals.

But at the same time, the development of exchanges and international investments was reflected in the multiplication of arbitrations between States and Businesses, either through *ad hoc* arbitrations or through arbitrations organized in an institutional framework, such as the International Chamber of Commerce, or the International Centre for the Settlement of Investment Disputes (ICSID). Aware of this development, the Secretaries-General of the International Bureau, Hans Jonkman and Tjaco van den Hout, did their utmost to see to it that the Bureau could benefit from it.

An initial stage in this evolution consisted in entrusting a role to the Secretary-General in the unfolding of certain arbitration procedures, when a Tribunal cannot be composed due to the default of one of the parties or a persistent disagreement between the parties. Indeed, there are now treaties which stipulate that in such an event the Secretary-General plays the role of “appointing authority”. In other cases, he is requested to designate this authority.

In this respect, we cannot emphasize enough the importance of the adoption, in 1976, by the United Nations Commission for International Trade Law (UNCITRAL) of a standard set of rules for businesses which want to call upon arbitration outside a predetermined institutional framework. These rules indeed gave jurisdiction to the Secretary-General to designate the appointing authority when an agreement could not be reached between the parties.

This text was intended to come into play in arbitrations between the State and businesses. However it was adopted, with various adaptations, by the Iran-United States Claims Tribunal, which also settled certain disputes between the two States. Therefore, the Secretary-General was called upon to designate an appointing authority in lieu of the Tribunal. His choice was the Presiding Judge of the Supreme Court of the Netherlands. The Presiding Judge and his successors as appointing authority intervened on several occasions thereafter, for appointments or dismissals of members of the tribunal.
The activity of the Secretary-General grew over time. But, to my knowledge, it was never again exercised in arbitrations between States and instead focused primarily on arbitrations between States and business. Therefore I will leave it up to Professor Crawford to cover this aspect.

The rebirth of the International Bureau however is not linked merely to the success of the UNCITRAL Rules, far from it. It also originates in the development of the Bureau’s service activities.

Under Article 47, para. 1 of the Convention of 1907, the Bureau was “authorized to place its offices and its staff at the disposal of the Contracting Powers for the use of any special Board of Arbitration”.

This text had been proposed by the British and Dutch representatives “with a view to permitting the Powers that would constitute special boards of arbitrations to use, if they so wished, the offices and staff already existing in The Hague.”

In the spirit of its authors, this provision was aimed at inter-state arbitrations, organized outside the Permanent Court. However, it was interpreted in a broad manner as of 1930 with the *Radio Corporation of America vs China* case in order to permit the International Bureau to offer its services even in disputes between a State and a public or private enterprise. As James Crawford will explain to you, this formula was recently retained in numerous similar cases.

Nonetheless, it was also applied in 1910 in inter-state cases and since 1988, the Bureau has provided offices or administrative staff in eleven inter-state disputes. Four of them concerned the application of the United Nations Convention on the Law of the Sea, on which Philippe Sands will speak. The seven others concerned very diverse domains: financial disputes; the environment, territorial litigations.

In the first category, three cases are noteworthy.

In the case of the fees paid for the use of Heathrow airport, the United States complained of the amount of the fees. In 1992, the Tribunal ruled that by accepting such fees, the United Kingdom had disregarded its obligations under the air transport agreement signed between the two States (known as the Bermuda II bilateral Air Transport Agreement). The United States filed a request for interpretation, which was rejected in 1994. Subsequently, an agreement was reached and the Tribunal did not have to rule on the American request for damages.

The second case of this type opposed Italy and Costa Rica, and concerned the manner in which an Italian bank had been dealt with in Costa Rica. The Arbitral Tribunal, once again formed following a *compromis*, pronounced an award in favor of Italy in 1998 by declaring that the respondent State owed the sum of $15,000,000.

The last dispute of this type concerned the settling of accounts for works conducted by France with the financial backing of the countries bordering the Rhine with a view to preventing the pollution of the river by chlorides. It opposed France and The Netherlands, and in 2004 the court, after having retained the calculation method put forth by The Netherlands, established the financial transfer to be carried out at roughly 19 million euros.
In the domain of environmental protection, two cases must be mentioned. In the first, Ireland complained of not having received from the United Kingdom certain data concerning a facility for reprocessing nuclear materials (called the MOX plant) built on the west coast of Great Britain, while, according to Ireland, such data should have been provided under the Convention for the Protection of the Marine Environment of the North East Atlantic. The arbitral tribunal rejected this request in 2003.

The second, more complex, case concerned the "Iron Rhine Railroad", the name given to the railroad line between Antwerp and the Ruhr which crossed the Netherlands north of Maastricht. This railroad, built in 1879, had been out of service since 1991, but Belgium wanted to re-activate it, invoking various XIXth century treaties which guaranteed its free passage. The Netherlands were determined however to impose various requirements for re-opening this line which concerned the natural reserves that had created in the region and it wanted Brussels to bear the financial burden. In 2005, the Tribunal confirmed Belgium’s railroad right-of-way. It decided that the operation of the line was subject to the application of Dutch regulations governing safety and environmental protection, but these regulations would not make the exercise of the right-of-way exceptionally difficult. Lastly, it described the principles governing the distribution of the financial risks and costs between the two countries.

As for the two territorial litigations handled with the cooperation of the International Bureau, both concerned the Horn of Africa.

The first opposed Eritrea and Yemen and concerned territorial sovereignty over the Hanish Islands and the establishment of the limits of the corresponding maritime areas. In a first ruling, the Arbitration Tribunal acknowledged in 1998 the sovereignty of Eritrea over two groups of islands located less than 12 miles from its coast and granted to Yemen sovereignty over the other islands on which it had exercised a certain degree of authority. Then, in a second phase of the procedure, in 1999 the tribunal established the limits of the parties’ maritime areas, retaining essentially the equidistance line between the two shores of the Red Sea.

The last of the cases which I shall mention here concerns Eritrea and Ethiopia. There had been a bloody conflict between the two countries from May 1998 to June 2000. They had agreed in December 2000 to create two Arbitral Tribunals, one to proceed to the delimitation and demarcation of their borders, the other to settle claims arising out of violations of international law occurring during the conflict. The first of these tribunals delimited the border in a 2002 ruling. The solution retained was challenged, however, and could not be concretely implemented in the field. The Tribunal then fixed points for demarcation, deeming that it could do no more, and declared in 2007 that it had completed the task assigned to it.

In these seven cases, the International Bureau of the PCA provided its assistance to the parties in various forms. In all cases, the International Bureau provided the logistic support necessary for managing funds, as well as the receipt and communication of written exhibits. In five cases, the Bureau was chosen as the Registry of the Arbitration Tribunal, or a member of the Bureau as registrar. The procedural rules of the Permanent Court of Arbitration were retained in two cases as the Tribunal’s procedural rules. Most of the hearings were held in the Peace Palace in three cases (while London, Paris or Rome were chosen in the others).
The duration of the proceedings was extremely variable:

- Sometimes very long: over five years the Heathrow case and the case between Eritrea and Ethiopia;
- Sometimes very brief: less than one year in the Italy/Costa Rica case;
- In most cases, somewhere between these two extremes:
  - Four years for the French-Dutch dispute concerning the pollution of the Rhine by chlorides;
  - Three years for the dispute concerning Eritrea and Yemen;
  - Two years in the case between Ireland and the United Kingdom and for the Iron Rhine Railroad (in which the parties had accepted to waive the entire oral proceedings).

These periods are linked, as is the case before the International Court of Justice, to the nature and complexity of the dispute, the parties’ wishes and the diligence of the Tribunal.

Lastly, it is interesting to note that in five cases, the rulings pronounced were pronounced by unanimous tribunals, while in two of them, the rulings were adopted at a majority and were accompanied by dissenting statements or opinions.

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This was in the past. What does the future look like?

There is no doubt that that calling upon judges and arbitrators to settle disputes between States has experienced a true regeneration over the last two decades. Will this trend continue in coming years? Will the International Bureau of the PCA continue to benefit from this trend? It seems to me that we have good reason to hope so.

We must remember however, before answering the first question, that States retain their power to choose, in solving their disputes, from among the numerous methods listed in Article 33 of the United Nations Charter. In the past, some cases, such as those involving the Beagle Canal or the Rainbow Warrior, have been solved by mediation. Others by negotiation. This will remain the case in the future and States will continue in certain cases to avoid resorting to the International Court of Justice or to arbitration.

These last two methods nonetheless allow States to find legal solutions to the problems which arise, and each plays its role in this process. This role however cannot be assigned *a priori* and States must decide this case by case.

As I have ascertained as a member and later as the President of the International Court of Justice, and then as a member of Arbitration Tribunals, the International Court of Justice and arbitration each have their advantages and drawbacks.

Before making their choice in this respect States must first examine the composition of the body to which they accept to defer. That of the International Court of Justice is
predetermined, and unless chambers are called upon, the Court rules with a panel of 15 judges representing the "principal legal systems of the world". Its authority is increased accordingly, but its proceedings are sometimes lengthened as a result.

Before the Court, each party may designate an *ad hoc* judge, if the Court does not include a judge of their nationality. Similarly, in arbitration, each party designates one out of three arbitrators, or two out of five arbitrators, depending on the size of the Arbitration Tribunal. Moreover, a dialogue can be initiated between the parties or between the arbitrators they have designated concerning the choice of the president of the Arbitration tribunal. These choices may also be made directly based on the nature of the disputes.

The parties’ freedom is thus greater in arbitration. But the designation of the arbitrators therefore implies a negotiation which may last for some time. However, generally speaking (exceptions still exist), the period required for this purpose remains short and may be utilized moreover for finalizing the parties’ arguments.

The parties also play a greater role in the arbitration procedure. Indeed, the International Court of Justice respects their desire, for example with respect to procedural delays, the determination of the number of submissions and the order in which they are exchanged or regarding the length of the hearings. But the procedural rules nonetheless apply.

In arbitration, the parties are free to choose the procedure which suits them and, in the past, have referred to the procedural rules of the PCA, those of ICSID, or have conducted the proceedings on an *ad hoc* basis. They are also free to choose the seat of the Arbitration Tribunal, in The Hague or elsewhere, and the place in which hearings may be held, as well as the languages of the arbitration. Lastly, the arbitration ruling may be kept confidential if the parties so wish.

What about timescales and costs?

For the first, all depends on the parties’ wishes, the nature of the dispute and the availability of the arbitrators or the judges. In this respect, if the Arbitration Tribunal is selected judiciously, and if the parties express their joint desire to obtain a rapid decision, arbitration may offer certain advantages.

With respect to costs, two approaches generally compete. Some emphasize that international justice is free, whether one considers the judges’ remuneration or the availability of the premises, while these costs must be borne by the parties in the case of arbitration. Others note that arbitration proceedings which last for a limited period can permit a lowering of the costs. But in both cases, a great deal depends on the remuneration of counsel.

In the end, international justice and arbitration each has its role to play in the peaceful settlement of disputes by law. Some litigation, territorial disputes in particular, is of such complexity that the International Court of Justice constitutes a more appropriate venue. On the other hand, there are disputes, financial disputes for example, for which arbitration is preferable. Everything depends on the kind of dispute, and I am convinced that the activity of the Arbitration Tribunals, alongside the activity of the International Court of Justice, will continue to develop in the future.
As for the International Bureau of the Permanent Court of Arbitration, it shall continue, I also believe, to enjoy the confidence of States. I personally have participated, both as an agent of the French government and as arbitrator, in both ad hoc arbitrations and in arbitrations conducted in an institutional framework. In light of this experience, I am convinced that this latter formula is preferable, in particular for managing the funds required by arbitration and the unfolding of the proceedings. In this respect, the International Bureau of the PCA constitutes a natural framework for interstate arbitrations. The experience it has acquired, its capacity to work both in French and in English and the flexibility it has displayed make it an organisation of choice, particularly for States.

To conclude, allow me to stand back and salute this centenary. At the beginning of the 20th century, interstate arbitration was the domain of a handful of sovereigns, and institutional arbitration was in its early stages. The Conventions of 1899 and 1907 constituted a decisive step in the right direction.

There was the danger that the creation of the Permanent Court of International Justice, then the International Court of Justice, would wield a fatal blow to arbitration. This did not occur, and even though the PCA may have entered a state of slumber, its International Bureau has succeeded in the last two decades in riding the wave of the regeneration of arbitration to develop its activities at the service of States.

For this we congratulate it and wish it the best of luck.